# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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AMERICAN INDEPENDENT INSURANCE CO. and AMERICAN INDEPENDENT SERVICE CO.,

Plaintiffs,

Plaintills

v. : NO. 97-4153

:

CIVIL ACTION

CHARLES M. LEDERMAN, INSURANCE :
FINANCIAL SERVICES, :
DOUGLAS M. BELL, DOUGLAS M. BELL :
& ASSOCIATES, INC., CARMEN J. :
COCCA, JR., PIC INSURANCE GROUP, :
INC., a/d/b/a PHYSICIANS INSURANCE :
COMPANY, CHRIS P. MAHER, FCAS, :
MAAA, MAHER ASSOCIATES, INC., :
DIANE CAPALDO, LARC INSURANCE, :
LTD., PRC LTD., ROCKWOOD CASUALTY :
INSURANCE CO., and PREMIER AUTO :
INSURANCE CO., :

Defendants.

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#### MEMORANDUM

ROBERT F. KELLY, J.

AUGUST 25, 2000

Presently before the Court are the five individual Motions for Summary Judgment of Defendants (1) Diane Capaldo Lederman ("Capaldo"); (2) Douglas M. Bell and Douglas M. Bell & Associates, Inc. ("Bell"); (3) Carmen J. Cocca, Jr. ("Cocca"); (4) Chris P. Maher and Maher Associates, Inc. ("Maher"); and (5) Charles M. Lederman ("Lederman"), Insurance Financial Services ("IFS"), Rockwood Casualty Insurance Co. ("Rockwood"), PRC, Ltd. ("PRC"), Premier Auto Insurance Co. ("Premier"), and LARC

Insurance, Ltd. ("LARC"). In addition, the Supplemental Motion for Summary Judgment filed by Defendants Lederman, Bell, Cocca, IFS, LARC and PRC ("the RICO Defendants") is also before the Court. The Plaintiffs, American Independent Insurance Company ("AIICO") and American Independent Service Company ("AISC"), allege an on-going fraud from 1991 through 1996 by Lederman and his co-Defendants, through which the Defendants tried to force the sale of AIICO at a low price, raided the assets of AIICO, and undermined AIICO's ability to conduct business. Plaintiffs allege violations by the Defendants of The Racketeer Influenced and Corrupt Organizations Act of 1984 ("RICO") and eleven state 18 U.S.C. § 1962, et seq. For the reasons that follow, laws. the summary judgment motions are granted in part and denied in part, and the RICO Defendants' Supplemental Motion for Summary Judgment is denied.

#### I. FACTS.

In April, 1990, AIICO, a mutual casualty insurance company, was converted from a health insurer to an automobile insurer. AIICO is a licensed Pennsylvania personal automobile insurance writer. All AIICO policies have six month terms and policyholders are required to pay 25% of their premium upon

<sup>&</sup>lt;sup>1</sup>Defendant PIC Insurance Group, Inc., also doing business as Physicians Insurance Company ("PIC"), was voluntarily dismissed without prejudice from this action on April 12, 1999, after it filed for bankruptcy.

application for insurance, with one payment twenty days later and the remainder payable over the next three months. AISC charges a service fee on each monthly bill sent to AIICO insureds.

On March 16, 1990, AIICO entered a Management Services Agreement with Insurance Financial Services ("IFS"), a consulting company owned by Lederman. Under this Management Services Agreement, Lederman, through IFS, agreed to provide all operational management services and negotiate with reinsurers.2 Lederman also agreed to oversee all AIICO and AISC matters. Lederman hired Bell to handle the day-to-day operations of AIICO and AISC. On November 30, 1993, IFS and AIICO entered into an Amended and Restated Management Services Agreement which renewed Lederman's overall management and administrative responsibility. Both Agreements contained non-compete clauses wherein IFS agreed not to compete with AIICO's automobile insurance business in Pennsylvania after the Agreements were terminated by IFS. 1990 Agreement contained a two year non-compete clause and the 1993 Amended Agreement contained a three year non-compete provision. Both Agreements also gave Lederman the authority to negotiate and secure reinsurance on AIICO's insurance policies

<sup>&</sup>lt;sup>2</sup>Reinsurance is an insurance policy issued to an insurer, in this case AIICO. <u>Employers Ins. of Wausau v. American Centennial Ins. Co.</u>, No.CIV.A.86 Civ. 8576 (KTD), 1989 WL 6631, at \*2 (S.D.N.Y. Jan. 24, 1989). The original insurer is known as the ceding insurer or cedent and the cedent's relationship with the reinsurer is contractual. <u>Colonial Am. Life Ins. Co. v.</u> Commissioner, 491 U.S. 244 (1989).

and prohibited IFS or Lederman from taking any brokerage fees.

Between 1990 and 1995, Lederman and Bell, on behalf of AIICO, entered into several reinsurance contracts, or treaties, which provided for a quota share arrangement between AIICO and the reinsurers.<sup>3</sup> Lederman and Bell initially placed AIICO's reinsurance through an independent broker with an authorized reinsurer, but Plaintiffs allege that Lederman prematurely commuted, or terminated, some of these treaties, thereby increasing AIICO's risk. Plaintiffs also allege that Bell executed all treaties on behalf of AIICO at Lederman's direction.

From 1991 through 1994, without a broker, Lederman placed AIICO treaties with LARC, an undercapitalized company which was created and controlled by Lederman.<sup>4</sup> Lederman's primary purpose in creating LARC, according to Plaintiffs, was to divert AIICO's assets and funds to the Defendants. In 1995, upon inquiry about LARC by the Pennsylvania Department of Insurance, Lederman placed AIICO's reinsurance with PRC. Neither LARC nor PRC had adequate funds to cover the obligations it had assumed from AIICO.

Plaintiffs allege the financial terms of the one-year

<sup>&</sup>lt;sup>3</sup>Under the contracts, AIICO and its designated reinsurers through the quota share arrangement would have shared, in a specific proportion, all risk, profits and losses during the contract period.

<sup>&</sup>lt;sup>4</sup>Both LARC and PRC are off-shore Barbados reinsurance companies created by Lederman.

treaties from 1990 through 1995 were favorable to the reinsurers and unfavorable to AIICO. The alleged unacceptable practices included prematurely commuting AIICO's obligations with respect to the LARC treaties for the policy years beginning January 1, 1991, January 1, 1992 and January 1, 1993, either on the date they expired or shortly after they expired. This caused a profit to LARC of several million dollars and a loss to AIICO in the same amount. AIICO also lost earnings as a result of its inability to write business based on money diverted from AIICO.

In the fall of 1993, Lederman advised the Chairman of AIICO's Board of Directors, Lewis Small, that AIICO's year-end capital and surplus would fall below minimum required levels under the National Association of Insurance Commissioners Guidelines. In November of 1993, Lederman promised to invest \$1.5 million in AIICO in exchange for 16% of AIICO's stock for his investment. Before he could receive the stock, however, Lederman was required to obtain approval for the acquisition from the Pennsylvania Insurance Department. He filed an application for approval but did not disclose his affiliation with LARC. According to Plaintiffs, Lederman withdrew his application rather than make the required disclosures. He therefore never received the stock.

Effective January 1, 1994, Lederman and Bell, on behalf of AIICO, executed a reinsurance treaty with LARC which covered

90% of AIICO's personal automobile insurance premiums and provided a 32% ceding, or yielding, commission to AIICO, which represented a percentage of premiums LARC returned to AIICO in order to pay for AIICO's operating expenses. AIICO was responsible, however, for all claims within a "loss corridor" of 63% to 80% of AIICO's premiums even though LARC received 90% of the premiums less the 32% commission. In November of 1994, Lederman informed Small that AIICO needed an additional \$800,000. by the end of the year to meet the National Association of Insurance Commissioners Guidelines. Small therefore examined AIICO's options to obtain the money. Lederman told Small that LARC would loan AIICO the needed funds at a substantial interest rate, but in the event of default, LARC would assume ownership of AIICO. Small rejected this idea and obtained bank financing.

Effective January 1, 1995, Lederman and Bell, on behalf of AIICO, executed a reinsurance treaty with PRC which was similar to the January 1, 1994 reinsurance treaty between AIICO and LARC. This treaty also called for AIICO to pay 90% of the personal automobile insurance premiums to PRC and AIICO was paid a ceding commission of 30%. AIICO was also responsible for all claims to the same extent as under the treaty with LARC.

In February of 1995, Maher, an actuary hired by
Lederman, prepared a report as part of the 1994 year-end
statement to the Pennsylvania Insurance Department reporting

AIICO's anticipated capital and surplus needs. In this statement, Maher and Bell certified that AIICO's reported reserves were sufficient, accurate and correct. At some point during the week of March 27, 1995, however, Lederman and Bell met with Lewis Small, AIICO's President, and his brother, Richard Small, an AIICO Director, to discuss AIICO's financial position. Lederman and Bell presented the Smalls with a Projected Financial Statement indicating that AIICO needed an additional surplus of between \$1.7 and \$2.0 million by year-end 1995. Maher had also reported this deficiency in his report to the Pennsylvania Insurance Department. During the meeting, Lederman and Bell persuaded the Smalls not to pursue additional capital, and endeavored to convince them that AIICO's financial situation was stable.

By letter dated April 7, 1995, Bell informed the Smalls and AIICO's other representatives that he expected AIICO's financial picture to strengthen over the subsequent two years and result in "an insurance company that is profitable and financially strong." At a breakfast meeting approximately one month later, however, Lederman and Bell advised the Smalls that Maher had changed his calculations to reflect that the company needed an additional \$7.5 million capital infusion. Lederman and Bell told the Smalls that unless this additional money was immediately invested, the Pennsylvania Insurance Department would

close AIICO.

A few days later, Lederman again contacted Lewis Small and arranged another breakfast meeting. At that subsequent meeting, Lederman demanded that Small either immediately raise the \$7.5 million or consider selling 100% of AIICO to Lederman and his partners at PIC. He advised Small that no traditional lending institution would provide the needed financing given the immediacy of the situation, which precluded the performance of due diligence. Small ultimately consented to the sale, asking Lederman and his partners to develop an offer.

On June 16, 1995, Cocca, PIC's President, mailed an offer to purchase AIICO to Small. On June 22, 1995, Small acknowledged receipt of the offer and requested copies of PIC's financial statements. On June 26, 1995, Cocca withdrew PIC's offer to purchase AIICO. Lederman, who was also the Chief Financial Officer of PIC, asked the Smalls to contact Cocca to reconsider. On June 28, 1995, Lederman resigned from the AIICO Board of Directors and from his position as head of reinsurance management and administration. On June 29, 1995, Maher wrote Lewis Small a letter listing reasons for the discrepancy between AIICO's most recent quarterly report and the \$7.5 million financial predicament claimed by Lederman and Bell. The reasons provided for the discrepancy were based upon the "risk corridors" in the January 1, 1994 and January 1, 1995 contracts with LARC

and PRC.

On June 30, 1995, Bell faxed a letter to the Smalls stating that: (1) he had a responsibility to inform the Pennsylvania Insurance Department of AIICO's financial condition and apparent insolvency; (2) he had discussed with his counsel whether he should inform the Insurance Department about AIICO's financial condition; (3) he intended to instruct AIICO agents and brokers to stop sending new applications for insurance to AIICO; and (4) he would prepare financial statements with the actuarial-determined reserve numbers which he expected would reflect a second quarter loss of \$9 million and a negative surplus of \$7 million.

On July 7, 1995, Bell resigned from AIICO's Board of Directors and from his position as AIICO's financial manager.

After July 7, 1995, Bell was employed by PIC and later worked for PIC's subsidiary, Rockwood, and Premier. Lederman was the Chief Executive Officer and President of Rockwood. Plaintiffs allege that while Bell and Lederman worked at AIICO, they also arranged a business relationship between AIICO and Comprehensive Casualty Company, an affiliate of Rockwood, which cost AIICO approximately \$200,000. In or around September of 1995, PIC became licensed to write automobile insurance and transferred the automobile insurance business to Rockwood. Rockwood was sold in December of 1996, and its automobile insurance business was then transferred

to Premier. Plaintiffs allege that Bell and Lederman offered incentives to AIICO agents and brokers to roll over policies to PIC, Rockwood and Premier, and Bell and Lederman also attempted to lure away key employees after their respective resignations.

Plaintiffs filed their fifteen-count Complaint on June 19, 1997, alleging RICO violations (Counts I through IV), state tort law violations for fraud, deceit and misrepresentation (Count V), conversion (Count VI), breach of fiduciary duty (Count VII), negligence (Count VIII) and breach of duty of loyalty and candor (Count IX). In addition, Plaintiffs also claim breach of contract (Count X), breach of covenant not to compete (Count XI), tortious interference with contractual relations (Count XII), breach of covenant of good faith and fair dealing (Count XIII), professional negligence and malpractice (Count XIV) and civil conspiracy (Count XV) against the various Defendants.

## II. STANDARD.

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The non-

moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

In this case, Plaintiffs, at times, fail to fully respond to arguments presented in the motions for summary judgment; however, this does not automatically entitle the movants to judgment. <a href="Anchorage Assocs.v.Board of Tax Review">Anchorage Assocs.v.Board of Tax Review</a>, 922 F.2d 168, 175 (3d. Cir. 1990). Rather, the Motions must be evaluated on the merits, and judgment entered in favor of the movants only if "appropriate." <a href="Id.">Id.</a>; FED. R. CIV. P. 56(e). In other words, the Motion may be granted only if the movants are entitled to "judgment as a matter of law." <a href="Anchorage Assocs.">Anchorage Assocs.</a>, 922 F.2d at 175.

#### III. DISCUSSION.

A. Supplemental Motion for Summary Judgment - Statute of Limitations on the RICO Claims in Counts I through IV.

RICO creates a private cause of action for a person injured in business or property under 18 U.S.C. section 1962. 18 U.S.C. § 1964(c). Plaintiffs allege that Defendants engaged in a "pattern of racketeering activity," an element necessary to state

a cause of action under RICO. 18 U.S.C. § 1962 (a)-(c). The first four counts of the Complaint contain the RICO allegations. The RICO Defendants filed a Supplemental Motion for Summary Judgment of these RICO claims, arguing that the statute of limitations bars these claims. These Defendants contend the statute of limitations began to run when Plaintiffs knew, or should have known, of the injury, citing the recently decided United States Supreme Court decision, Rotella v. Wood, \_\_\_\_\_ U.S. \_\_\_\_\_, 120 S.Ct. 1075 (2000).

under which a plaintiff's cause of action accrues when the plaintiff discovers, or should discover, both an injury and a pattern of racketeering activity. <u>Id.</u> (citations omitted). The third approach, adopted by the Third Circuit, utilizes the "last predicate act" rule, under which the limitations period begins to run when the plaintiff knows or should know of the injury and the pattern of racketeering activity, but the limitations period begins to run anew with each predicate act, allowing recovery for harm caused by all earlier predicate acts. <u>Id.</u> (citation omitted).

Ten years after Malley-Duff, the Supreme Court again approached the limitations issue in Grimmett v. Brown, 519 U.S. 233 (1997), but declined to modify its prior holding, dismissing the writ of certiorari in that case as improvidently granted. That same term, the Court revisited the issue in Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997). In Klehr, the Court specifically rejected the Third Circuit's "last predicate act" rule. Id. at 187-191. The Court did not, however, resolve the conflict among the Circuit Courts because the writ before the Court "commit[ted it] to decide only whether the purely legal question of whether or not a claim accrues 'where the Respondent continues to commit predicate acts' in the 4-year period

immediately preceding suit." Id. at 193. Thus, the conflict among the Circuit Courts remained unresolved as to whether the "injury discovery" rule or the "injury and pattern discovery" rule should be followed to determine the limitations period. Rotella, the Supreme Court rejected the "injury and pattern discovery" rule, but did not settle upon a final rule to determine the accrual period under the injury discovery rule or the actual accrual time for a civil RICO statute of limitations. Rotella, \_\_\_\_, U.S. \_\_\_\_, 120 S.Ct. at 1080 n.2, 1083-84. Court specifically stated, however, that "[i]n rejecting pattern discovery as a basic rule, we do not unsettle the understanding that federal statutes of limitations are generally subject to equitable principles of tolling, . . . and where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty, complementing Federal Rule 11(b)(3)." <u>Id.</u> at \_\_\_\_\_, 120 S.Ct. at 1084. Thus, the Court did not entirely

<sup>&</sup>lt;sup>5</sup>In his concurrence, Justice Scalia recognized a fourth accrual rule, the Clayton Act "injury occurrence" rule under which "the cause of action accrues and the statute begins to run when a defendant commits an act that injured a plaintiff's business." Klehr v. A.O. Smith Corp., 521 U.S. 179, 196 n.1, 198 (1997)(citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971)). Justice Scalia strongly opined that the Supreme Court should adopt this rule since the Clayton Act provided the basis for the Court's prior determination of the civil RICO four-year statute of limitations. Id. at 197-199. This is especially relevant because "[a]s a practical matter, a 4-year statute of limitations means nothing at all unless one knows when the four years start running." Id. at 199.

dismiss the idea that equitable tolling provisions could apply to toll the statute of limitations.

After Rotella, there are two possibilities for accrual of AIICO's RICO claim in the instant case: 1) the time of injury, and (2) the time plaintiff knows or should have known of its injury. Because these Defendants claim that the Plaintiffs' RICO claim is clearly time-barred under the more stringent standard, the time of injury, they first analyze Plaintiffs' RICO claim under the more lenient standard, the time that plaintiff knows or should know of its injury. Defendants cite Lederman's entry into re-insurance treaties 1) with LARC in the period from 1991 through 1994, and 2) with PRC in 1995, as the injuries which comprise AIICO's RICO claim. Each reinsurance treaty covered a one-year period. The Defendants allege that AIICO's RICO claim is time-barred under the time of injury rule because AIICO first incurred injury on January 31, 1992, when the first reinsurance treaty was commuted, and this lawsuit was filed on June 19, 1997, well over four years later.

The RICO Defendants state that AIICO's RICO claim fails even under the "injury discovery" rule. Working backward chronologically from June 19, 1997, the date AIICO filed suit, they state that the relevant date for determining whether AIICO started its suit beyond the statute is June 19, 1993. The RICO Defendants contend that because AIICO first knew of its injury,

the treaty commutation, in 1992, no question exists as to whether AIICO knew of the injury before June, 1993. Specifically, the RICO Defendants contend that Lewis Small executed three Quarterly Statements in 1992 for submission to the Pennsylvania Insurance Department containing the statement that "[e]ffective January 31, 1992, the 25% quota share treaty with LARC, Ltd. was commuted." (Certain Defs.' Mem. Law in Supp. of Supplemental Mot. for Summ. J. at 8). This statement, according to the RICO Defendants, put Plaintiffs on notice that they would be solely responsible for payment of all losses otherwise covered by the 1991 reinsurance agreement, without any contribution from LARC. Thus, they contend that the latest time that AIICO should have known of this injury was 1992, and that this suit, filed in 1997, is therefore time-barred.

At deposition, Lewis Small, AIICO's President, when asked about his knowledge of reinsurance treaties and commutation of such treaties, offered the following:

- Q: Do you have an understanding what it means to commute a reinsurer's treaty?
- A: I do today. I mean it's not a term I knew back when.
- Q: What does it mean?
- A: It means to terminate.
- Q: And when is it that you gained an understanding of the meaning of that term?
- A: It was dealing with this surplus relief. So it would be back in around '92. Somewhere around '92.

- Q: Okay. What is it that you were told at or around that time about commutation, if anything?
- A: Well, Lederman told me that he, that he commuted the commercial taxicab treaty. That was the first time, I think, or cut it off, or whatever term he used, but that was the first time I really understood it because
- Q: Did he tell you what the effect of that was?
- A: You say effect. What do you mean?

  (Defs.' Supp. Motion for Summ. J., Ex. A, L. Small Dep. at 196197.) While this testimony establishes Lewis Small's knowledge
  of the commutation in 1992, there is still an issue whether Mr.

  Small had knowledge of the effect of that commutation.

The Plaintiffs, in their Response, state that "the real issue is not when the injury occurred, but when [plaintiff]

American knew or should have known of its injuries and their cause." (Pls.' Resp. to Supp. Mot. Summ. J. at 9.) Plaintiffs further contend that even if Lewis Small knew that the underlying reinsurance agreements were "financial reinsurance," that they had been commuted, and that the immediate effect of the commutations was to leave AIICO solely responsible for all losses, Small did not know that Lederman owned LARC. In addition, Plaintiffs contend that Small did not know that Lederman was using these reinsurance commutations as part of an alleged larger fraudulent scheme, the goal of which was to siphon assets from AIICO so that it could be bought at a low price.

The RICO Defendants, however, correctly argue that the

Plaintiffs' additional requirement, that they must have known the cause of the injury, is a misstatement of the governing legal principle. Rather, the relevant inquiry is what, if any, injury Plaintiffs allege. At issue, then, is Mr. Small's knowledge, or lack thereof, of the effect which the reinsurance treaties had upon AIICO. Because this is a disputed issue of material fact, summary judgment cannot be granted. Consequently, the RICO Defendants' Supplemental Motion for Summary Judgment with respect to the statute of limitations is denied. Thus, the individual motions for summary judgment with respect to Plaintiffs' RICO

<sup>&</sup>lt;sup>6</sup>Lewis Small testified at his deposition regarding his lack of knowledge:

Q: With the exception of the one taxi treaty that he told you that was commuted in, that he told you in 1992 it had been commuted, did he tell you that any other treaties had been commuted?

A: No. Absolutely not. We had - our assumption was we had true reinsurance and they would get commuted somewhere, like I just described, somewhere down the road when all the accident claims are paid and everything is divvied up.

Q: All right. Did you ever become involved in an analysis of the results of a possible commutation of reinsurance treaties?

A: That would be so far outside my expertise, it would be like you asking me to perform a brain operation.

A: I would rely on him to do it. . . I might also comment on that that I couldn't even read a reinsurance treaty and tell you what it says.

<sup>(</sup>L. Small Dep. at 202-203.)

claims will be examined.

## B. Standing - American Independent Service Company.

As a preliminary matter, the Defendants argue that Plaintiff, American Independent Service Company, ("AISC"), has no standing because AISC was incorporated on July 18, 1995, after the alleged wrongful conduct occurred. Plaintiffs counter by stating that "[t]o the extent that AIICO's property and business were injured by defendants' conduct, it necessarily follows that AISC, although a sister company, was injured." (Pls.' Mem. of Law in Opp'n to Mots. Summ. J. at 31.) Plaintiffs rely on two cases from the United States Court of Appeals for the Second Circuit to support their theory that courts have found that plaintiffs may suffer damages as a result of RICO violations aimed at other parties. The Defendants correctly note, however, that there is no evidence that any Defendant ever had a relationship with AISC, that any Defendant ever owed a duty to AISC, or that AISC was ever a party to any agreement, existing or proposed, with the Defendants. Thus, AISC is dismissed from this case.

## C. RICO.

RICO requires the assertion of the existence of an enterprise. In the course of this action, AIICO has set forth three different variations of the enterprise through which the Defendants acted. First, in its Complaint, AIICO alleges that

Lederman, Bell, Cocca, IFS, PIC, LARC and PRC constituted an enterprise consisting of an "association-in-fact" which engaged in activities that affected interstate commerce. (Compl., ¶ 52.) This association-in-fact enterprise was formed, AIICO alleges, for the illegitimate purpose of siphoning money and assets of AIICO, and had an existence separate and apart from those acts, providing insurance services, reinsurance and selling insurance products. (Id.) It is also alleged that each member of the association-in-fact enterprise directly or indirectly received income as a result of the enterprise. (Id.) The predicate acts committed by this association-in-fact enterprise were mail and wire fraud for the purpose of executing the fraudulent scheme to siphon funds from AIICO. The alleged victims of this association-in-fact enterprise were AIICO and AISC.

The second enterprise allegation is found in AIICO's RICO Interrogatory answers, where the section 1962(c) enterprise is identified as either 1) IFS or 2) an association-in-fact consisting of all Defendants and some non-parties. (Cocca's Mem. Law in Supp. Mot. for Summ. J. at 7-8.) Plaintiffs change their enterprise theory for the third time between Counts I and III of the Complaint. In Count I, the enterprise is an association-in-fact and in Count III, for purposes of section 1962(b) liability, the enterprise is AIICO and AISC.

# 1. <u>Count I - 18 U.S.C. § 1962(c)</u>.

Section 1962(c) requires five elements: (1) the existence of an enterprise that affects interstate commerce and is separate and distinct from the Defendants; (2) the Defendants were associated with the enterprise; (3) the Defendants conducted or participated in the affairs of the enterprise; (4) each Defendant engaged in a pattern of racketeering activity; and (5) the racketeering was the proximate cause of AIICO's injury. Moore v. Reliance Standard Life Ins. Co., No. CIV.A.98-4610, 1999 WL 299577, at \*3 (E.D. Pa. May 10, 1999)(citing <u>City of Rome v.</u> <u>Glanton</u>, 958 F. Supp. 1026, 1043 (E.D. Pa. 1997)(citing <u>Shearin</u> v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165 (1989), aff'd, 133 F.3d 90 (3d Cir. 1997))). For purposes of section 1962(c), the enterprise must be distinct from the Defendants. 18 U.S.C. § 1962(c). According to the United States Supreme Court, one must participate in the operation or management of the enterprise itself in order to be liable under section 1962(c). Reves v. Ernst & Young, 507 U.S. 170, 176-185 (1993).

Defendant Bell moves for summary judgment on the allegations against him in Count I on the basis that there is no evidence of record to indicate that he conducted the affairs of the alleged enterprise. Rather, the evidence reveals that he worked at Lederman's direction. Defendants contend that Bell may be considered a "wrongdoer," but not a director of the enterprise.

In <u>University of Md. at Baltimore v. Peat, Marwick,</u>
<u>Main & Co.</u>, 996 F.2d 1534 (3d Cir. 1993), the Third Circuit
rejected the plaintiffs' contention that the services of the
defendant, an independent auditor for an insurance company,
satisfied the <u>Reves</u> standard. <u>Id.</u> at 1539-1540. In that case,
the plaintiffs alleged that the auditor participated in the
affairs of the insurance company, which was the alleged
enterprise, by performing deficient audits and issuing
unqualified auditor's opinions, attending a number of the
insurance company's Board meetings, and performing other
accounting and computer services for the insurance company. <u>Id.</u>
at 1539. The Third Circuit stated:

Simply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result. There must be a nexus between the person and the conduct in the affairs of an enterprise. The operation or management test goes to that nexus. In other words, the person must knowingly engage in 'directing the enterprise's affairs' through a pattern of racketeering activity.

<u>Id.</u> (citing <u>Reves</u>, 507 U.S. at 178-179).

"Liability under section 1962(c) is not limited to upper management," however. Reves, 507 U.S. at 184. In fact, the Supreme Court has stated that "an enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management."

Id. at 184. The Supreme Court, however,

specifically declined to determine "how far section 1962(c) extends down the ladder of operation." <u>Id.</u> at 184 n.9. Thus, even though the Defendants claim that Bell is a mere wrongdoer, he could still be considered a lower rung participant in the enterprise.

Further, AIICO alleges that four bonuses which Bell received directly from LARC or IFS at Lederman's direction and without AIICO's knowledge were bribes. Bell contends that these bonuses were awarded to him as a result of his complaints to Lederman that he was being paid less than what was available in the market. The Supreme Court also stated in Reves that "[a]n enterprise also might be 'operated' or 'managed' by others 'associated with' the enterprise who exert control over it as, for example, by bribery." Id. at 184. Thus, a material question of fact regarding Bell's role with respect to the RICO enterprise exists. Accordingly, Bell is denied summary judgment for the 1962(c) claim against him in Count I.

Defendant Cocca also moves for summary judgment of the allegations against him in Count I on the basis that AIICO has not proven that he participated in the management or operation of any of the alleged section 1962(c) enterprises. According to Cocca, there is no evidence of his participation in the operation of the association-in-fact RICO enterprise to siphon funds from AIICO, nor is there evidence that he participated in the

operation of IFS or AIICO. Just as the record reflects that Bell acted at Lederman's request, according to Cocca, the only evidence against him with respect to a violation of section 1962(c) is that he made an offer to purchase AIICO based on information provided by Lederman.

The evidence which AIICO sets forth in support of its theory that Cocca was a director of PRC and was personally involved in the decision making about PIC's offer to purchase AIICO is sufficient to create a genuine issue of material fact for the jury regarding Cocca's section 1962(c) liability. Thus, Cocca is denied summary judgment with respect to Count I.

# 2. Count II - 18 U.S.C. $\S$ 1962(c).

Both Bell and Cocca move for summary judgment of Count II of the Complaint which contains allegations that they took part in a conspiracy to violate section 1962(c). 18 U.S.C. § 1962(d). In order to establish a conspiracy claim, the plaintiffs must plead and prove "1) an agreement to commit the predicate acts; 2) knowledge of those acts as part of a pattern of racketeering in violation of (a), (b) or (c); and 3) an injury proximately caused by the conspiracy." City of Rome, 958 F.

<sup>&</sup>lt;sup>7</sup>Although Count II is entitled "Conspiracy to Violate RICO Section 1962(c) and Count IV is similarly entitled "Conspiracy to Violate RICO Section 1962(b)," the Defendants correctly note that the RICO provision dealing with conspiracy is located at section 1962(d). As such, this Court will analyze the various Motions for Summary Judgment as to Counts II and IV subject to 18 U.S.C. section 1962(d).

Supp. at 1043 (citing <u>Shearin</u>, 885 F.2d at 1166). AIICO presents evidence of Bell's participation in siphoning funds from AIICO, the object of the conspiracy. This evidence includes his signing reinsurance treaties on behalf of AIICO, sending allegedly deceptive correspondence to AIICO's principals indicating Bell's anticipation of AIICO's continued success, and Bell's resignation after AIICO's financial distress was disclosed.

In addition, AIICO presents evidence that Cocca acted in furtherance of the enterprise at Lederman's request. Cocca, as President of PIC, made an offer to purchase AIICO, allegedly at Lederman's direction. Although that offer was later rejected, the existence of the offer precludes judgment for Cocca regarding a conspiracy. Thus, Bell's and Cocca's Motions as to Count II are denied.

# 3. <u>Count III - 18 U.S.C. § 1962(b)</u>.

As stated previously, Plaintiffs again change their theory of the RICO enterprise in Count III and allege that AIICO and AISC were the enterprise through which Defendants acted.

Count III contains allegations that the Defendants violated 18

U.S.C. section 1962(b).8 An entity or person claiming an injury

<sup>\*</sup>Section 1962(b) makes it unlawful "for any person through a pattern of racketeering activity or through a collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(b).

under section 1962(b) must allege and prove that: (1) the defendants acquired or maintained control of the enterprise through a pattern of racketeering activity; and (2) the plaintiffs suffered "an injury independent from that caused by the pattern of racketeering." Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1191 (3d Cir. 1991). In the instant case, Cocca contends that he is entitled to summary judgment because he did not acquire or maintain control of AIICO, the alleged section 1962(b) enterprise, through a pattern of racketeering activity. In addition, the RICO Defendants argue that they are entitled to summary judgment of the section 1962(b) claim because AIICO cannot show it suffered an injury separate from the injury caused by the predicate racketeering acts of fraud.

AIICO responds to Cocca's argument that he cannot be liable under section 1962(b) by pointing to evidence which, according to AIICO, "is enough to show that Mr. Cocca had an interest in the enterprise under section 1962(b)." (Pls.' Mem. Law in Opp'n to Mots. for Summ. J. By Certain Defs. at 20.)

"'[C]ontrol' has been held to require participation in the actual operation or management of the enterprise. The nature of the 'interest' in the enterprise has been described as 'a proprietary one,' including 'participation in advantage, profit and responsibility.'" Keystone Helicopter v. Textron, Inc., No. CIV.A.97-257, 1997 WL 786453, at \*2 (E.D. Pa. Dec. 2,

1997)(citations omitted). Here, there is no evidence that Cocca had an interest in or control of AIICO. Cocca's Motion as to Count III is therefore granted.

Injury caused by the racketeering acts is not cognizable under section 1962(b). Lightning Lube, 4 F.3d at 1191. Rather, an independent injury must be alleged. Id. According to the RICO Defendants, even if the allegations against them are true, AIICO still does not have a section 1962(b) claim because it cannot prove that it suffered an injury proximately caused by their control of AIICO separate from the alleged predicate acts. AIICO claims that it suffered independent injury when "Defendants lied to get control over AIICO and then, once they gained control, they used that control to harm AIICO by siphoning assets from AIICO to other companies that they controlled and owned. These companies eventually competed against AIICO." (Pls.' Mem. Law in Opp'n to Mots. for Summ. J. By Certain Defs. at 13.) AIICO relies upon Keystone Helicopter, in which the court denied a motion to dismiss the plaintiff's section 1962(b) claim, finding the injury requirement of section 1962(b) was satisfied where allegations suggested that defendants, by either maintaining an interest in or controlling the enterprise, induced the plaintiff to make expenditures. Keystone Helicopter, 1997 WL 786453, at \*2. Here, AIICO states that Lederman and Bell, by maintaining control of AIICO, induced

AIICO to enter into "expensive, self-dealt reinsurance contracts." (Pls.' Mem. Law in Opp'n to Mots. for Summ. J. By Certain Defs. at 13.)

The RICO Defendants contend that their alleged exercise of control over AIICO to commit the predicate acts of fraud and self-dealing is indistinct from the predicate acts by which they allegedly maintained control over AIICO. Therefore, because Plaintiffs claim no additional injury independent of that allegedly caused by this predicate conduct, the section 1962(b) claim fails. AIICO, in response, argues that the requisite independent injury consisted of the siphoning of its assets, as well as the conspirators' use of the money and information they received from AIICO to fund their companies and to compete against AIICO.

AIICO's claim that it suffered from the direct competition of companies allegedly funded by Defendants' use of money siphoned from AIICO sufficiently alleges a separate injury independent of the predicate acts of mail and wire fraud. Thus, the RICO Defendants, with the exception of Cocca, are denied summary judgment as to Count III of the Complaint.

# 4. <u>Count IV - 18 U.S.C. § 1962(b)</u>. 9

Count IV contains an allegation that certain Defendants conspired to violate section 1962(b). Cocca is not liable under

<sup>&</sup>lt;sup>9</sup>See supra, n.7.

section 1962(b). Cocca cannot, therefore, be liable for conspiracy to violate section 1962(b) since "the Third Circuit has clarified that any 'claim under § 1962(d) based on a conspiracy to violate the other subsections of § 1962 necessarily must fail if the substantive claims . . . are themselves deficient.'" <a href="Dugan v. Bell Tel. of Pa.">Dugan v. Bell Tel. of Pa.</a>, 876 F. Supp. 713, 721 (W.D. Pa. 1994)(citing <a href="Lightning Lube">Lightning Lube</a>, 4 F.3d at 1191).

Accordingly, summary judgment is granted to Cocca on Count IV to the extent that AIICO alleges he conspired to violate section 1962(b). The allegations in Count II against Cocca remain, however, for conspiracy to violate section 1962(c). <a href="See supra">See supra</a>, section III.c.2.

AIICO also alleges in Count IV that Lederman, Bell, IFS, LARC and PRC conspired to violate section 1962(b). Because this Court has found that sufficient evidence exists which precludes summary judgment in favor of the RICO Defendants, except Cocca, on the section 1962(b) claim, the RICO Defendants' motion for summary judgment of the conspiracy to violate section 1962(b) is also denied with respect to those remaining RICO Defendants.

# D. Statute of Limitations - State Law Tort Claims.

Defendants move for summary judgment on AIICO's state law tort claims contained in Counts V through IX and XV on the basis that these claims are barred by Pennsylvania's two-year

statute of limitations found in 42 Pa. C.S.A. section 5524. 42

Pa. C.S.A. § 5524. The claims in Counts V through IX and XV are for fraud, deceit and misrepresentation (Count V), conversion (Count VI), breach of fiduciary duty (Count VII), negligence (Count VIII), breach of duty of loyalty and candor (Count IX), and civil conspiracy (Count XV). AIICO filed suit on June 19, 1997; therefore, the Defendants claim that they cannot be liable for conduct which occurred before June 19, 1995.

The statute of limitations begins to run at the time "the right to institute and maintain the suit arises." Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983)(citations omitted). In other words, "the statute begins to run when the cause of action arises, as determined by the occurrence of the final significant event necessary to make the claim suable." Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co., 372 F.2d 18, 20 (3d Cir. 1966), cert. denied, 387 U.S. 930 (1967)(citations omitted). Pennsylvania law recognizes an exception to the statute of limitations "which 'delays the running of the statute until the plaintiff knew, or through the exercise of reasonable diligence should have known, of the injury and its cause.'" Beauty Time, Inc. v. VU Skin Sys., Inc., 118 F.3d 140, 144 (3d Cir. 1997)(citing Urland v. Merrell-Dow Pharm., 822 F.2d 1268, 1271 (3d Cir. 1987)).

The Pennsylvania Supreme Court has further held that

"the 'discovery rule' exception arises from the [plaintiff's] inability, despite the exercise of diligence, to determine the injury or its cause, not upon a retrospective view of whether the facts were actually ascertained within the period." Pocono Raceway, 468 A.2d at 471-472. The Defendants cite a case in which this Court stated: "[The discovery rule] has never been deemed applicable to cases alleging . . . civil conspiracy . . . Walls v. Sabatasso Foods, Inc., No. CIV.A.91-1107, 1991 WL 111191, at \*2 (E.D. Pa. June 18, 1991), aff'd, 953 F.2d 1382 (3d Cir. 1992). In the instant case, however, in addition to civil conspiracy, AIICO alleges fraud by the Defendants. Consequently, the discovery rule may be applicable to the instant cause of action. "The very essence of the discovery rule in Pennsylvania is that it applies only to those situations where the nature of the injury itself is such that no amount of vigilance will enable the plaintiff to detect an injury." Haggart v. Cho, 703 A.2d 522, 529 (Pa. Super. 1997)(quoting <u>Dalrymple v. Brown</u>, 701 A.2d 164, 170 (Pa. 1997)(citing <u>Pocono Raceway</u>, 468 A.2d at 471))). Reasonable diligence has been defined as "[a] fair, proper and due degree of care and acting, measured with reference to the particular circumstances; such diligence, care or attention as might be expected from a man of ordinary prudence and activity." Beauty Time, 118 F.3d at 144 (citing Black's Law Dictionary 457 (6th ed. 1991)).

AIICO insists that this limitations issue is a matter for the jury. The Pennsylvania Supreme Court has stated:

Whether the statute has run on a claim is usually a question of law for the trial judge, but where the issue involves a factual determination, the determination is for the jury. Specifically, the point at which the complaining party should reasonably be aware that he has suffered an injury is generally an issue of fact to be determined by the jury; only where the facts are so clear that reasonable minds cannot differ may the commencement of the limitations period be determined as a matter of law.

Hayward v. Medical Ctr. Of Beaver County, 608 A.2d 1040, 1043 (Pa. 1992). AIICO, invoking the discovery rule, states that it filed suit as soon as its principals had notice of Defendants' fraud and performed a reasonably diligent investigation into whether actual fraud existed. The Defendants argue that AIICO cannot dispute that the statute of limitations began to run no later than May, 1995, at a breakfast meeting between the Smalls, Lederman and Bell. They point to the testimony of Lewis Small regarding the breakfast meeting on or about June 2, 1995, and contend that his reaction to Lederman's disclosure on that date that AIICO's reserve deficiency was \$7.5 million to \$8 million more than previously reported is an acknowledgment by Small of AIICO's injury. Small stated:

I said that it's absolutely impossible for an actuary that's trained and controlled by Lederman who himself is an actuary to have come up with a report in February that this company is perfectly normal and then as of a

month later to be down \$8 million in reserves. Either two things have happened, since Lederman and Bell - Bell has certain financial responsibilities, he was an auditor at Coopers, he was - he worked for Reliance, he works for Lederman, Lederman himself was an actuary who trained Maher, so I said there's either two things that have caused this, there's either gross malpractice on their part or there's absolute fraud here. I said, you tell them that I will find out.

(L. Small Dep. at 1047-49.) Defendants contend that this statement is proof that AIICO's intentional tort claims are barred by the statute of limitations because it shows that Lewis Small, and AIICO, knew that an injury had occurred and knew the cause of the injury prior to June 19, 1995. Defendants further contend, citing the District Court for the Middle District of Pennsylvania, that "[f]or statute of limitations purposes, a claimant need only be put on inquiry notice by 'storm warnings' of possible fraud." Ciccarelli v. Gichner Sys. Group, Inc., 862 F. Supp. 1293, 1301 (M.D. Pa. 1994)(citation omitted).

AIICO argues, in response, that the breakfast meeting, which occurred on an uncertain date, did not provide it with the requisite notice, since the Defendants communicated nothing factual about why Maher changed his actuarial methodology between the 1994 year-end reserve analysis and the first quarter 1995 analysis. Plaintiffs further claim that the fraud culminated in June, 1995, when the following occurred: (1) Defendants withdrew their offer to purchase AIICO on June 26, 1995; (2) Maher wrote a

letter to Lewis Small on June 29, 1995, outlining his reasons for the discrepancy between the 1994 year-end reserve analysis and the first quarter 1995 analysis; and (3) Lederman resigned his AIICO position on June 28, 1995. On June 19, 1995, the Defendants made their offer to purchase AIICO. Plaintiffs cite Brunea v. Gustin, 775 F. Supp. 844 (W.D. Pa. 1991), to support their theory that the discovery rule tolls the statute of limitations when an injured person is unable, "despite the exercise of diligence, to determine the injury or its cause." Id. at 846.

This Court disagrees with Defendants' interpretation of Lewis Small's statement as providing suspicion and therefore knowledge by Small that fraudulent conduct or malpractice had occurred. In <a href="Beauty Time">Beauty Time</a>, the Third Circuit concluded that "the discovery rule applies in Pennsylvania when the underlying cause of action sounds in fraud, and . . . the statute of limitations is tolled until the plaintiff learns or reasonably should have learned through the exercise of due diligence of the existence of the claim." <a href="Beauty-Time">Beauty-Time</a>, 118 F.3d at 148. Thus, the issue of when AIICO learned or reasonably should have learned of the existence of its claim as well as whether AIICO was sufficiently diligent in discovering the fraud remains for the jury and those portions of Defendants' Motions for Summary Judgment with respect to expiration of the state law tort statute of limitations are

denied.

## E. Maher's Motion For Summary Judgment - Damages

Maher separately moves for summary judgment of the state law claims filed against him, for Fraud, Deceit and Misrepresentation (Count V), Professional Negligence and Malpractice (Count XIV) and Civil Conspiracy (Count XV), on the basis that each claim requires proof of actual damages and AIICO has not shown that any of Maher's actions caused AIICO actual damages. In this case, according to Maher, AIICO has produced no expert reports or other evidence proving that Maher did anything, improper or otherwise, which caused AIICO any damage whatsoever.

AIICO responds that "[b]ecause participation in a RICO conspiracy renders the actor liable for all reasonably foreseeable damages resulting from the conspiracy, Maher is jointly and severally liable with his co-conspirators for all the damages to [AIICO]." (Mem. Law in Opp'n to Maher's Mot. for Summ. J. at 23.) There are no RICO allegations against Maher in the Complaint. However, Maher's Motion for Summary Judgment with respect to the Counts V, XIV and XV will be examined.

## F. AIICO's State Law Claims.

# 1. <u>Count V - Fraud, Deceit and Misrepresentation</u>.

AIICO's first state law claim, for fraud, deceit and misrepresentation, is brought against Lederman, Bell, Cocca, Maher, IFS, LARC and PRC. Maher filed an individual motion for

summary judgment as to this claim. See supra, section III.E.

Under Pennsylvania law, fraud requires the following elements:

"(1) a misrepresentation; (2) a fraudulent utterance thereof;

(3) an intention by the maker that a recipient will thereby be induced to act; (4) justifiable reliance by the recipient upon the misrepresentation; and (5) damage to the recipient as the proximate result of the misrepresentation." Sowell v. Butcher & Singer, Inc., 926 F.2d 289 (3rd Cir. 1991)(citation omitted).

Fraud consists of "anything calculated to deceive, whether by single act or combination or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture." Moser v. DeSetta, 589 A.2d 679, 682 (Pa. 1991)(citation omitted).

According to Maher, AIICO's fraud claim against him is premised on the allegation that he intentionally produced fraudulent, inaccurate and/or misleading actuarial projections. Maher notes, however, that AIICO fails to produce evidence or an expert report challenging his reports and projections, therefore AIICO cannot establish, according to Maher, that his actuarial projections were incorrect or misleading.

In response, AIICO states that the evidence against
Maher shows that Maher acted fraudulently. Maher applied one
type of actuarial technique, classified by Maher's expert as a

traditional technique, in calculating AIICO's reserves in the first, second and third quarters of 1994. Maher testified, according to AIICO, that these three quarterly reserve studies indicated significantly higher reserve deficiencies than indicated in a previous study. Maher further testified that he applied a different actuarial technique, classified by his expert as a non-traditional technique, in the fourth quarter of 1994. Although the third quarter 1994 reserve study indicated a reserve deficiency of over \$600,000., this fourth quarter 1994 study indicated no reserve deficiency at all. Then, in Maher's first quarter 1995 reserve study, he once again applied the traditional actuarial techniques used in his first three 1994 quarterly reserve studies.

AIICO states that Maher's decision to apply a non-traditional technique in the last quarter of 1994 and revert to the traditional methodology in preparing his first quarter 1995 reserve analysis had the effect of concealing from AIICO the development of the unexpected and nearly fatal reserve deficiency. (Mem. Law in Opp'n Maher's Mot. for Summ. J. at 20-21.) Maher's expert, however, testified that it was reasonable to use one actuarial method prior to December 31, 1994 but then not use that method for the December 31, 1994 report. (Id., Ex. N at 60.) In addition, the expert states that Maher properly changed his methodology back to the more traditional methodology

from December, 1994 to March, 1995, because in "hindsight, it was obvious to him that the assumptions and the reliance or the projections that he had made in '94 . . . did not come to pass."

(Id., Ex. N at 89-90.)

AIICO also cites the June 29, 1995 letter from Maher to Lewis Small for support of its fraud claim against Maher. AIICO states that "Maher's intent in sending the letter, the meaning of the actual text of the letter, and his purpose in consulting Lederman before sending the letter to Small are all issues to be determined by the jury." (Id. at 22.) Maher responds to this statement by claiming that there are no material misrepresentations in his June 29, 1995 letter to Lewis Small. (Mem. Law in Supp. of Maher's Mot. Summ J. at 15)(citing Ex. B, Maher Dep., Ex. 38). Further, Maher states that he never threatened to report AIICO to the Pennsylvania Insurance Department in this correspondence, but merely states that as AIICO's actuary, he "may be required to contact the insurance department if [AIICO] does not address its reserve [deficiency] problem." (Id.) Maher never contacted the Insurance Department. (Maher Dep. at 250.) Maher's final rebuttal to AIICO's fraud claim is by the time Lewis Small received Maher's letter, Small had already been informed of the results of the independent actuary examination which Small had ordered, which were "in the ballpark" with Maher's analysis of AIICO. (Mem. Law in Supp. of

Maher's Mot. Summ. J. at 15)(citing Ex. C, Bealer Dep. at 46-47; Ex. D, L. Small Dep. at 1475).

Disputed issues of material fact exist which preclude entry of summary judgment for Maher for fraud, deceit and misrepresentation. Maher's Motion for summary judgment is therefore denied with respect to Count V.

#### 2. Count X - Breach of Contract.

Count X of AIICO's Complaint contains a claim for breach of contract against Lederman, Bell and IFS. A plaintiff must show, in order to prove a breach of contract under Pennsylvania law: "(1) the existence of a valid and binding contract to which the plaintiff and defendants were parties; (2) the contract's essential terms; (3) that plaintiff complied with the contract's terms; (4) that the defendant breached a duty imposed by the contract; and (5) damages resulting from the breach." Wausau Underwriters Ins. Co. v. Shisler, No. CIV.A.98-5145, 2000 WL 233236, at \*5 (E.D. Pa. Feb. 28, 2000)(citing <u>Gundlach v. Reinstein</u>, 924 F. Supp. 684, 688 (E.D. Pa. 1996), aff'd without op., 114 F.3d 1172 (3d Cir. 1997)). One cannot be liable for breach of contract unless one is a party to that contract. <u>Electron Energy Corp. v. Short</u>, 597 A.2d 175, 177 (Pa. Super. 1991), <u>aff'd</u>, 618 A.2d 395 (Pa. 1993)(citations omitted). AIICO claims that Bell, Lederman and IFS breached the 1990 and 1993 Agreements "by . . . failing to negotiate reinsurance

treaties at arm's length, commuting the treaties prematurely and siphoning monies and assets from AIICO." (Compl., ¶ 97.)

Bell moves for summary judgment, claiming that because he never entered into a contract with AIICO, he cannot be liable for breach of contract. 10 Rather, Bell emphasizes that he was employed by Bell & Associates which had an independent contract with IFS under which he became responsible for AIICO's day-to-day operations. Specifically, he states that "IFS entered into an independent contract with Bell & Associates by which Bell & Associates, as a subcontractor of IFS, agreed to provide certain services." (Bell's Mot. for Summ. J. at 12-13)(citing Bell Aff., ¶¶ 3-4.) Thus, neither Bell nor Bell & Associates ever contracted with AIICO. Because Bell was not a party to any contract with AIICO, he is entitled to summary judgment of Count X, breach of contract.

3. <u>Counts XI and XII - Breach of Covenant Not to Compete and Tortious Interference With Contractual Relations.</u>

The Defendants move for summary judgment of Counts XI and XII on the basis that AIICO cannot bring these claims against them because AIICO failed to comply with discovery orders in this case. In response, AIICO states that it believes it has complied with all the discovery rulings and it will present witnesses at

 $<sup>^{10}</sup>$ In support of this motion, Bell submits an affidavit in which he affirms that he never entered into a contract with AIICO. AIICO did not respond to this affidavit.

trial who will testify about Defendants' attempts to steal AIICO's employees and agents. The Defendants, in turn, state that this insufficient proffer of evidence cannot defeat their motions for summary judgment because AIICO must present evidence that they interfered with Plaintiff's contracts or acted with an intent to harm AIICO, a requirement for tortious interference with contract.

a. Count XI - Breach of Covenant Not to Compete.

Count XI, breach of covenant not to compete, is filed against Lederman, Bell, IFS, Rockwood and Premier. Bell, Rockwood and Premier cannot be liable for breach of a covenant not to compete because they never contracted with AIICO. Those Defendants, therefore, are granted summary judgment on Count XI. Lederman and IFS, the remaining Defendants, move for summary judgment of AIICO's claim that they violated the covenant not to compete found in the 1993 Amended and Restated Management Services Agreement between IFS and AIICO. The covenant prohibited selling private passenger automobile insurance policies in the geographic area where AIICO operated. Lederman signed the Agreement as President of IFS.

Lederman and IFS argue that, even if AIICO could prove damages for a breach of this Agreement and could bring this claim against them, it still would not prevail because: (1) the Agreement was void since the Pennsylvania Department of Insurance

rejected it in 1994 because its terms violated Department regulations and Department approval of the Agreement was required under Pennsylvania law, and (2) even if the Agreement became effective and was enforceable despite its illegality, the non-competition provisions became operative if, and only if, IFS terminated the Agreement. Lederman and IFS claim that IFS did not terminate the contract because, according to Lewis Small, "I was the president up until I fired Lederman. . . . He actually never resigned from his management contract." (L. Small Dep. at 125, 256.)

Although Lederman and IFS have not formally moved for summary judgment of the breach of contract claim at Count X pertaining to the 1990 and 1993 Management Services Agreements, they claim that the 1993 Agreement was rendered void by the Pennsylvania Insurance Department regulations which required that management contracts contain "clear and precise termination provisions, specifying a termination date not later than 5 years

<sup>11</sup>The non-competition provision of the 1993 Amended and Restated Management Services Agreement is identical to the 1990 Management Services Agreement except as to time. The 1993 Agreement states, in pertinent part, "[i]n the event this Agreement is terminated by IFS, IFS hereby agrees that it shall not for a period of three (3) years commencing with the effective date of the termination carry on or be engaged in the business of providing automobile insurance in the geographic locations [AIICO] has issued policies of insurance in competition with [AIICO]." (Certain Defs.' Mem. Law in Supp. Mots. for Summ. J., Ex. E at § D.) The 1990 Agreement prohibited IFS from competing for two years after termination.

after the date of execution, and may not provide for automatic renewal." 31 Pa. Code § 127.4(f)(1). The 1993 Agreement had an initial term of five years from December 1, 1993, the effective date of the contract, with automatic renewals of successive one-year terms unless either party canceled the Agreement by providing at least 90 days advance written notice to the other party prior to an anniversary date of the agreement.

Because the termination provision was contrary to this administrative regulation, Lederman and IFS contend the contract, and the covenant not to compete contained in the contract, are void. AIICO argues that "[t]here is clearly an issue of fact as to the termination of that [1993] agreement and the extent and effect of the Pennsylvania Insurance Department's disapproval of that agreement. Indeed, there are material issues of fact concerning each Defendant's breach of that agreement . . ."

(Pls.' Mem. Law in Opp'n to Mots. Summ. J. by Certain Defs. at 32.) In the event that the Agreement was not void, according to the Defendants, the covenant not to compete was never triggered because IFS did not terminate the contract. Because there are issues of material fact whether the 1993 Agreement was void and also whether the IFS terminated the contract, Lederman and IFS are denied summary judgment with respect to Count XI.

 $<sup>^{12}</sup> The~1993$  Agreement provides "In the event this Agreement is terminated by IFS, . . . " (Certain Defs.' Mem. of Law in Supp. Mot. Summ. J., Ex. E, at 4, ¶ D.)

b. Count XII - Tortious Interference With Contractual Relations.

The allegations in Count XII are against Lederman, Bell and Cocca for tortious interference with AIICO's contractual business relations with existing and prospective policyholders and with AIICO's contractual relations with employees, brokers and agents. AIICO also alleges in this claim that IFS, Rockwood and Premier are responsible for the wrongful acts of their principals under theories of respondeat superior, master and servant, principal and agent, and apparent authority. In the alternative, AIICO alleges that IFS, Rockwood and Premier knowingly participated, conspired with and/or aided and abetted Lederman, Bell and Cocca to tortiously interfere with AIICO's previously identified contractual relations.

The Defendants move for summary judgment, stating that AIICO has failed to come forward with evidence of any tortious interference. AIICO responds that it "will present at trial witnesses who will testify as to Defendants' attempt to steal AIICO's employees and agents." (Pls.' Mem. Law in Opp'n to Mots. for Summ. J. By Certain Defs. at 32.)

The Restatement (Second) of Torts section 766 (1979) version of tortious interference with contract has been adopted by Pennsylvania. Remick v. Manfredy, 52 F. Supp.2d 452, 461 (E.D. Pa. 1999). This Restatement (Second) version recognizes two distinct branches of the tort: the first concerns existing

contractual rights and the second concerns prospective contractual relations. <u>Id.</u> "Under the Restatement, 'one who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by . . . causing the third person not to perform the contract, is subject to liability . . . for the pecuniary loss resulting . . . from the third person's failure to perform the contract.'" <u>Id.</u> (citing <u>U.S. Healthcare</u>, <u>Inc. v. Blue Cross of Greater Phila.</u>, 898 F.2d 914, 924-925 (3d Cir.), <u>cert. denied</u>, 498 U.S. 816 (1990); <u>Adler, Barish</u>, <u>Daniels</u>, <u>Levin and Creskoff v. Epstein</u>, 393 A.2d 1175 (Pa. 1978), <u>cert. denied</u>, 442 U.S. 907 (1979)).

The following elements must be demonstrated for interference with prospective contractual relations: "(1) a prospective contractual relation; (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage resulting from the defendant's conduct." Id. (citations omitted).

AIICO alleges that Bell, Lederman and Cocca interfered with its existing and prospective contracts with its customers and its employees. Bell, after his resignation from AIICO Board of Directors, worked for Rockwood and Premier. In addition, Lederman was the Chief Executive Officer and President of Rockwood and Cocca was the President of PIC, which became

licensed to write automobile insurance and transferred that insurance to Rockwood. Since there are many factors necessary to the determination of interference and there are factual questions raised by the record, summary judgment must be denied as to AIICO's claims for tortious interference with contractual relations.

## 4. <u>Count XIII - Breach of Covenant of Good Faith and</u> Fair Dealing.

The next state law claim which is the subject of Defendants' motions for summary judgment is breach of the covenant of good faith and fair dealing, filed against Lederman and Cocca. Lederman does not move for summary judgment on this claim. Cocca, however, moves for summary judgment on the basis that he never entered into a contract with AIICO and Pennsylvania courts do not recognize a tort-based claim for breach of implied covenants. Cocca states that his only contact with AIICO was with respect to the offer to purchase AIICO, which he made on behalf of PIC and which was later withdrawn. Cocca maintains that this concept of a duty of good faith and fair dealing does not apply to him because no contract was ever executed between AIICO and PIC. Further, Cocca argues that there can be no independent breach of the duty of good faith and fair dealing; these duties must be implied in a contract.

AIICO responds to Cocca's Motion in their Consolidated Response by stating that Cocca totally ignores the evidence

revealed through discovery in this action. (Pls.' Mem. Law in Opp'n to Mots. Summ. J. By Certain Defs. at 20-22.) Plaintiffs state that Cocca was "more than a passive 'business partner' of Lederman. He appeared to receive a third of everything Lederman did, including receiving money from Begley Court Reporting."

(Id. at 20.)<sup>13</sup> Cocca further notes that AIICO did not respond to his Motion for Summary Judgment for breach of good faith and fair dealing, therefore he is entitled to summary judgment on this claim because it is uncontested. Pursuant to the Federal Rules of Civil Procedure, however, this claim must be reviewed to determine if summary judgment is warranted. FED. R. CIV. P. 56(e).

It has been held that "every contract imposes upon the parties a duty of good faith and fair dealing in the performance and enforcement of the contract." See Liazis v. Kosta, Inc., 618 A.2d 450, 454 (Pa. Super. 1992)(citing Germantown Mfg. Co. v. Rawlinson, 491 A.2d 138, 141 (1985) and Restatement (Second) of Contracts § 205). The duty of good faith has been defined as "honesty in fact in the conduct or transaction concerned."

<sup>&</sup>lt;sup>13</sup>Plaintiff acknowledges Cocca's statement at his deposition that he did not know he was a director of PRC, another RICO Defendant, until his deposition, and that he did not participate in any fraudulent activities, but the Plaintiff states that "the jury may see it quite differently." (Pls.' Mem. of Law in Opp'n to Mots. for Summ. J. By Certain Defs. at 20-21)(citing Ex. L at 12, Ex. M). Despite Cocca's supposed lack of knowledge about his PRC directorship, AIICO does not meet its summary judgment burden on this issue.

Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 617 (3d Cir. 1995)(citing 13 Pa. C.S.A. § 1201 (1984)); see also

Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. 1992). "Absent a contract, . . ., there is no breach of the duty of good faith and fair dealing." Delaware Trust Co. v. Lal, No. CIV.A.96-4784, 1998 WL 833854, at \*9 (E.D. Pa. Nov. 30, 1998)(citing Somers, 613 A.2d at 1213). In this case, Cocca submitted, on PIC's behalf, an offer to purchase AIICO. That offer was never accepted by AIICO, and the parties never entered into a contract. Because there was no contract, there is no breach of the duty of good faith and fair dealing. Thus, Cocca is granted summary judgment for Count XIII.

# 5. <u>Count XIV - Professional Negligence and</u> Malpractice.

Maher, AIICO's actuary from 1990 through 1995, is the sole Defendant against whom AIICO brings its claim for professional negligence and malpractice. AIICO claims that Maher committed professional malpractice by: (1) artificially reducing the total anticipated reserves for 1994 reported to the Pennsylvania Insurance Department in February 1995; (2) failing to calculate the anticipated reserves for 1994 based on traditional actuarial factors; (3) increasing the total anticipated reserves for 1994 in and around April, 1995, thereby assisting the Lederman Group in exerting pressure on AIICO and AISC to sell out to PIC; and (4) threatening to report the higher

reserve total to the Insurance Department in order to continue exerting pressure on AIICO to sell out to PIC. (Compl., ¶ 115.) Maher bases his Motion for Summary Judgment on three reasons: (1) AIICO has no proof that he caused AIICO actual damages, (2) AIICO does not have an expert establishing his professional malpractice and thus cannot prove its case against him; and (3) the statute of limitations for AIICO's malpractice claim began to run no later than May, 1995, and is therefore time-barred. The statute of limitations argument has already been rejected by this Court. See supra, section III.D.

AIICO contends in response that this claim "is about Maher's participation in a conspiracy to defraud American and his wilful misuse of his skills as an actuary, not whether he possessed such skills. Maher's diversionary attempt to turn [AIICO's] case against him into a battle of actuarial experts should be rejected." (Pls.' Mem. Law in Opp'n to Maher's Mot. for Summ. J. at 18.) AIICO further urges this Court to accept its theory that the only disputed issue regarding Maher's actuarial studies is Maher's intent in preparing those studies. AIICO identifies the disputed issue as follows:

whether [Maher's] admittedly selective use of actuarial techniques was intended to hide [AIICO's] burgeoning reserve deficiency in late 1994 in order to precipitate a financial crisis for [AIICO] in the Spring of 1995 when a more accurate analysis of [AIICO's] reserve deficiency was prepared by Maher in the [sic] May, 1995. No expert testimony is needed to

elucidate Maher's state of mind.

Id. at 18-19. Because AIICO correctly identifies Maher's intent in selectively applying various actuarial techniques as the key disputed issue, Maher's Motion regarding Count XIV must be denied.

### 6. <u>Count XV - Civil Conspiracy</u>.

The final state law claim against Defendants is civil conspiracy. This Court previously denied the Defendants' Motion for Summary Judgment with respect to the expiration of the statute of limitations for AIICO's state law tort claims. See supra, section III.D.14 A civil conspiracy "is a combination of two or more persons to do an unlawful or criminal act or to do a lawful act by unlawful means or for an unlawful purpose or an overt act done in pursuance of the common purpose, and actual legal damage." 1 Summ. PA Jur.2d Torts § 13:1 (1999). See also Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. 1310, 1328 (E.D. Pa. 1994); Larsen v. Philadelphia Newspaper, 602 A.2d 324, 339 (Pa. Super. 1991); Slaybaugh v. Newman, 479 A.2d 517, 519 (Pa. Super. 1984); and Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466 (Pa. 1979). Malice, the intent to injure and a lack of justification for this intent, are essential parts of a civil conspiracy cause of action. <u>Barmasters Bartending Sch. v. Authentic Bartending</u>

 $<sup>^{14}\</sup>mbox{Bell's}$  individual Motion for Summary Judgment also incorporates the statute of limitations arguments. (Bell's Mot. Summ. J. at 2.)

Sch., 931 F. Supp. 377, 386 (E.D. Pa. 1996)(citing Rutherford v. Presbyterian-University Hosp., 612 A.2d 500, 508-509 (Pa. Super. 1992)). However, "[m]erely describing something as malicious is not sufficient to give the proper inference of malice, meaning an intent to injure. . . . [m]alice requires an allegation that the sole purpose of the conspiracy was to injure the Plaintiffs."

Spitzer v. Abdelhak, No. CIV.A.98-6475, 1999 WL 1204352, at \*9

(E.D. Pa. Dec. 15, 1999)(citing Thompson, 412 A.2d at 466).

In the Complaint, AIICO alleges that the "defendants conspired . . . to deplete plaintiffs' assets and take over plaintiffs for their own benefit and to the detriment of plaintiffs." (Compl., ¶ 120.) These activities, AIICO alleges, "were taken with the intent to injure the business activities of plaintiffs including, without limitation, depleting the assets and monies of AIICO . . . and endeavoring to eliminate AIICO as a competitor in the automobile insurance market." (Compl., ¶ 121.) Thus, AIICO alleges that the sole purpose of the conspiracy was to injure AIICO.

Defendant Diane Capaldo, Lederman's wife, moves for summary judgment, claiming that AIICO has not produced sufficient evidence to prove its conspiracy claim against her. To buttress her Motion, Capaldo filed an affidavit, supported by W-2s, stating that she never received income or anything of value from LARC, AIICO or AISC. She further argues that AIICO provides no

evidence to rebut her affidavit. A review of Capaldo's deposition testimony and the Power of Attorney and Declaration of Representative executed by Lederman on November 25, 1991, which Capaldo signed as a disinterested witness, reveals a material issue of fact regarding Capaldo's knowledge and involvement in the alleged conspiracy. Thus, Capaldo's Motion is denied.

Cocca also moves for summary judgment of the common law conspiracy claim against him on the basis that AIICO can produce no evidence to link Cocca to an alleged conspiracy. Cocca contends that the only evidence which links him to an alleged conspiracy "boils down to little more than the allegation that he was a business partner of Charles Lederman in certain matters." (Cocca's Mot. Summ. J. at 12.) According to Cocca, even if everything said about Lederman and the other Defendants were true, there is still no link between Cocca and any alleged conspiracy.

AIICO, in response, cites Cocca's deposition testimony that he met with Lederman several times to discuss the offer from PIC to buy AIICO as evidence that Cocca was part of a conspiracy. (Pls.' Mem. Law in Opp'n to Mots. for Summ. J. By Certain Defs. at 21)(citing Ex. L, Cocca Dep. at 78-84.) AIICO states "[a] jury should be allowed to determine what was discussed at those meetings: the fraudulent takeover of AIICO." (Id.) In addition, to refute Cocca's claim that he was an unwilling participant in

an alleged conspiracy, AIICO cites Cocca's deposition testimony that he made decisions as PIC's President on his own. (Id.)

This evidence creates a genuine issue of material fact whether Cocca was a conspirator. Consequently, Cocca's Motion is denied as to Count XV.

Maher also moves for summary judgment of Count XV on the basis that no evidence exists that he conspired with any other Defendant. The allegation in the Complaint is that "[u]pon information and belief, Maher knowingly participated and/or aided and abetted in the Lederman Group's scheme to siphon off plaintiffs' monies and assets with the intention of taking over plaintiffs or removing AIICO as a competitor in the automobile insurance market." (Compl., ¶ 114.) Lewis Small conceded at deposition that Maher's sole role in the alleged conspiracy was to render incorrect or misleading actuarial studies and to pressure Small into selling AIICO to PIC by sending him the June, 1995 letter telling Small that Maher may have to report AIICO's reserve deficiency to the Pennsylvania Insurance Department. (L. Small Dep. at 1510-11.)

This Court notes a discrepancy as to the claimed relationship, or lack thereof, between Maher and Lederman in Maher's Answers and Objections to AIICO's First Set of Interrogatories Nos. 10 and 11. In Interrogatory No. 10, Maher describes his personal relationship with Lederman as "no

'personal relationship'"... "Lederman and Maher have a business relationship whereby Maher has worked with Lederman for 15 years. Lederman provided much of Maher's training as an actuary." (Certain Defs.' Resp. to Pls.' Mot. for Leave to File Supplemental Opp'n to Certain Defs.' Supplemental Mot. for Summ. J., Ex. B at 4-5.) In contrast, Maher states in his response to Interrogatory No. 11 that the first time he met Lederman was "August 1994. Lederman was the head of the actuarial department for Fred S. James." (Id. at 5.) This discrepancy creates a genuine issue of material fact regarding Maher's relationship with Lederman and whether Maher took part in an alleged conspiracy. Accordingly, Maher's Motion for Summary Judgment on Count XV is denied.

#### IV. CONCLUSION.

For all of the above reasons, the Defendants'
Supplemental Motion for Summary Judgment is denied, and the
individual Motions for Summary Judgment are granted in part and
denied in part.

An Order follows.

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN INDEPENDENT INSURANCE

v.

CIVIL ACTION

CO. and AMERICAN INDEPENDENT

SERVICE CO.,

Plaintiffs,

:

,

: NO. 97-4153

:

CHARLES M. LEDERMAN, INSURANCE FINANCIAL SERVICES,

FINANCIAL SERVICES,

DOUGLAS M. BELL, DOUGLAS M. BELL

& ASSOCIATES, INC., CARMEN J.

COCCA, JR., PIC INSURANCE GROUP,

INC., a/d/b/a PHYSICIANS INSURANCE:

COMPANY, CHRIS P. MAHER, FCAS,

MAAA, MAHER ASSOCIATES, INC.,

DIANE CAPALDO, LARC INSURANCE,

LTD., PRC LTD., ROCKWOOD CASUALTY

INSURANCE CO., and PREMIER AUTO

INSURANCE CO.,

Defendants.

Detelidancs.

### ORDER

AND NOW, this 25th day of August, 2000, upon consideration of the Motions for Summary Judgment and the Responses, Replies and Sur-Replies thereto, it is hereby ORDERED that:

- Defendants' Supplemental Motion for Summary Judgment is DENIED;
- 2. Cocca is GRANTED summary judgment on Count III
  (RICO § 1962(b)), Count IV (RICO § 1962(b)Conspiracy), and Count
  XIII (Breach of Covenant of Good Faith and Fair Dealing);
- 3. Bell is GRANTED summary judgment on Count X (Breach of Contract) and Count XI (Breach of Covenant Not to

## Compete);

- 4. Rockwood is GRANTED summary judgment on Count XI (Breach of Covenant Not to Compete);
- 5. Premier is GRANTED summary judgment on Count XI (Breach of Covenant Not to Compete); and
- 6. Plaintiff, American Independent Service Co., is DISMISSED.

BY	יתדדים	COURT:
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Robert F. Kelly, J.